Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-251

GARLAND M. FITZPATRICK, et al.,

Petitioners,

v.

FREDERICK BITZER, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ALAN RABINOVITCH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

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OCTOBER TERM, 1975

No. 75-251

GARLAND M. FITZPATRICK, et al.,
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BRIEF OF ALAN RABINOVITCH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Interest of the Amicus

Alan Rabinovitch respectfully submits this brief as *amicus curiae* in support of petitioners. The consent of the attorneys for both petitioners and respondents to the filing of this brief has been obtained.[1]

Alan Rabinovitch is a Canadian citizen lawfully admitted to permanent residence in the United States. He is 21

[1] By letters dated January 13 and 14, 1976, respectively, Sidney D. Giber, Assistant Attorney General of Connecticut, and Austin Carey, Jr., attorney for petitioners, indicated that the parties hereto had "no objection" to the filing of an *amicus curiae* brief on behalf of Alan Rabinovitch. (Copies of the letters have been filed with the Clerk.)

years old and has lived in New York State and New York City since coming to the United States in 1964. He received the bulk of his primary and secondary school education in New York City public schools and is presently a junior enrolled in Brooklyn College, a part of the City University of New York. In January 1973 Mr. Rabinovitch took the New York State Regents Qualifying Examinations and was notified in April of that same year that his performance on the test had earned him an academic performance scholarship.[2] In addition, he was informed that tuition assistance program awards would also be available to him.[3] In May 1973 he was informed that in order to receive a Regents Scholarship and tuition assistance he would have to forthwith apply for American citizenship. He refused and in September 1973, was advised that the offer of a Regents Scholarship and tuition assistance had been withdrawn on the sole ground that, since he did not intend to become a citizen of the United States, then Section 602 (2)—since renumbered § 661(3)—of the New York Education Law[4] precluded his receipt of any form of financial assistance from New York State toward the cost of his higher education.

Mr. Rabinovitch brought suit in the United States District Court for the Eastern District of New York challenging the constitutionality of New York Education Law § 661(3) on the grounds that it violated both the Fourteenth

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[2] *See* New York Educat[illegible] Law §§ 605, 670 *et seq.* (McKinneys 1974).

[3] *See id.* §§ 604, 667 et seq.

[4] "Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship."

Amendment and the Supremacy Clause of the Constitution. *Rabinovitch* v. *Nyquist,* 74 Civ. 1142 (OGJ). He sought the convening of a three-judge district court, 28 U.S.C. §§ 2281 and 2284, which motion was granted.[5]

As a consequence of the enforcement of § 661(3) of the Education Law, Mr. Rabinovitch has been forced to attend a public college and has been deprived of any financial assistance toward the cost of his higher education. For the academic years 1973-74 and 1974-75, it is estimated that he has been deprived of between $500 and $2,000. At the close of the current academic year that amount will increase to between $750 and $3,000.

In addition to seeking declaratory and injunctive relief, Mr. Rabinovitch has prayed for a judgment against the New York State Higher Education Services Corporation ("NYSHESC")[6] equal to the amount of withheld scholarship and tuition assistance funds. He has argued alternatively that a judgment against NYSHESC would not constitute a judgment against New York State barred by the Eleventh Amendment or that the Eleventh Amendment does not bar federal courts from ordering the payment of withheld funds in an action brought under the Fourteenth Amendment and federal statutes to redress a deprivation of equal protection of the laws.

The case of *Rabinovitch* v. *Nyquist* was argued on joint motions for summary judgment in July 1975. A decision has not yet been rendered, and counsel has reason to be-

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[5] In Buffalo, New York, a French national enrolled in graduate studies in the State University brought a similar lawsuit challenging Education Law § 661(3). *Mauclet* v. *Nyquist,* Civ-75-73 (W.D.N.Y.). By order of Chief Judge Kaufman of the Second Circuit, a single three-judge court was convened to adjudicate both cases.

[6] *See* New York Education Law §§ 652-655, 657, 660, 680, 686 (McKinneys 1974).

lieve that the court's decision will be withheld pending this Court's opinion in *Fitzpatrick* v. *Bitzer*.

Mr. Rabinovitch's interest in the instant case is accordingly direct and vital. It is likely that the Court's decision herein will directly affect his claim for withheld scholarship and tuition assistance funds.[7] As such, he submits this brief setting forth the views of his counsel as to the questions of law presented by the instant case. In addition, this brief explicates, in summary fashion, the application of the controlling constitutional principles here at stake to the case of an alien seeking redress from a denial of equal protection.

Argument

1. In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the district court, after finding that Illinois had administered its programs of Aid to the Aged, Blind and Disabled in a manner inconsistent with federal law, awarded prospective injunctive relief and, in addition, ordered state officials to make back payments of the funds unlawfully withheld. That award was upheld in the court of appeals, but was reversed by a vote of 5-4 in this Court. In *Edelman* the Court dealt only with the question whether the award of retroactive benefits against Illinois to redress a violation of federal regulations under the Social Security Act

[7] It is assumed in this brief that Mr. Rabinovitch will prevail on the question of the unconstitutionality of Education Law § 661 (3). *See In re Griffiths*, 413 U.S. 717 (1973); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948); *Truax* v. *Raich*, 239 U.S. 33 (1915); *Miranda* v. *Nelson*, 351 F. Supp. 735 (D. Ariz. 1972) (three-judge court), *aff'd* 413 U.S. 902 (1973); *Chapman* v. *Gerard*, 456 F.2d 577 (3d Cir. 1972); *Jagnandan* v. *Giles*, 379 F. Supp. 1178 (N.D. Miss. 1974) (three-judge court); *Purdy & Fitzpatrick* v. *California*, 71 Cal. 2d 556, 79 Cal. Rptr. 77, 456 P.2d 645 (1969).

violated the Eleventh Amendment. While the question whether the Fourteenth Amendment limits the ban of the Eleventh in a case brought under the former's equal protection clause was raised by an *amicus* in that case, the Court quite properly did not reach that issue. *See* 415 U.S. at 694 n. 2 (Marshall, J., dissenting). As the Court had done before, see *Ex parte Young*, 209 U.S. 123, 150 (1908), it declined to decide whether the Fourteenth Amendment limited the effect of the Eleventh because as *Edelman* came to the Court it simply was not a Fourteenth Amendment case.

This case confronts the Court, for the first time, with the unavoidable question as to whether the award of monetary damages against a state is authorized by the Fourteenth Amendment for the purpose of granting complete relief to victims of a denial of equal protection suing under a federal statute passed pursuant to the authority vested in Congress by Section 5 of that Amendment. The decision in *Edelman* did not and could not speak to this issue because that case came before the Court in the context of a decision finding only that Illinois had violated federal regulations.

The Second Circuit based its contrary conclusion upon the surprising contention that in *Edelman* this Court "expressly overruled" earlier Fourteenth Amendment cases which granted retroactive monetary awards. *Fitzpatrick* v. *Bitzer*, 519 F.2d 559, 571 (2d Cir. 1975). To the same effect, *see Jordan* v. *Gilligan*, 500 F.2d 701, 709 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975); *Skehan* v. *Board of Trustees of Bloomsberg State College*, 501 F.2d 31, 42-43 n. 7 (3d Cir. 1974), *vacated*, 421 U.S. 983 (1975). However, the Court in *Edelman* was careful not to overrule those cases; rather, the Court stated only that "we *disapprove* the Eleventh Amendment holdings of those cases *to the extent* [*if any*] *that they are inconsistent with our holding today*." 415 U.S. at 671. (Emphasis supplied.) It is

submitted that the Court did no more than urge caution when relying on such cases in the Eleventh Amendment context. It could do no more because in *Edelman* the Fourteenth Amendment issue was not at stake, and it was not decided.

2. Sovereign immunity is but a procedural incident to sovereignty itself. In the discussions of sovereign immunity leading to the embodiment of that immunity in the Eleventh Amendment, the question of whether and to what extent a state had sovereign immunity was considered to turn on whether and to what extent the state itself was sovereign. *See Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419, 429 (1793) (Inedell, J., dissenting); *The Federalist,* Number 81 (Hamilton) (Dawson ed. 1863) p. 567. It was understood that state sovereignty could be lost by a substantive constitutional limitation on the powers of the states and that, in such a case, immunity would fail as well.

At the time this was a concession of no practical consequence. The Constitution as it existed prior to the Civil War contained few significant limitations on the sovereignty of the states in dealing with individual citziens. In the decade following the Civil War, however, this situation was deliberately and drastically altered by adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, which expressly limited the powers of the states in their relations with private citizens. Those enactments, together with the statutes enforcing them, were conceived by Congress as clearly altering the relationship between the states and the nation, and working a "vast transformation" from the concepts of federalism that had prevailed in the late 18th century. *Mitchum v. Foster,* 407 U.S. 225, 242 (1972); *Zwickler* v. *Koota,* 389 U.S. 241, 245-46 (1967). As the legislative history of the Reconstruction Amendments demonstrates, those constitutional proclamations were understood to work a substantial restriction on the prior sovereignty and reserved rights of the states.

The Fourteenth Amendment created precisely the case in which immunity has no place, for it stripped the states of their pre-existing power to sanction denials of equal protection. In the areas proscribed by the Reconstruction Amendments the states no longer enjoy any sovereign power which can or should be protected by the Eleventh Amendment.

That any rights arising under the Reconstruction Amendments should be without a fully effective remedy is particularly inappropriate since those Amendments, especially the Fourteenth, were primarily remedial. The manifest desire of Congress, in framing the Reconstruction Amendments and subsequent legislation, was to exercise all its power to create fully effective remedies and to withdraw from the states any power to defeat or prevent enforcement of certain basic rights. Under these circumstances the existence of an Eleventh Amendment defense in litigation under the Fourteenth Amendment seeking monetary damages is entirely incompatible with the rights protected by the Amendment.

3. In deciding the specific issues involved in *Fitzpatrick* v. *Bitzer,* the Court should bear in mind the particular and different context presented by the *Rabinovitch* case.

A. Since federal power in the area of regulating the immigration and legal status of aliens is supreme and exclusive,[8] the states have been, from the moment of the ratification of the Constitution, wholly without sovereign power which could have been subject to protection via the

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[8] The power to regulate the immigration and naturalization of aliens is vested exclusively in the federal government. *Fong Yue Ting* v. *United States,* 149 U.S. 698, 713 (1893); *Truax* v. *Raich, supra,* 239 U.S. at 42; *Hines* v. *Davidowitz,* 312 U.S. 52, 62 (1941); *Takahashi* v. *Fish & Game Commission, supra,* 334 U.S. at 419; *Graham* v. *Richardson, supra,* 403 U.S. at 377-78; U.S. Const. Art. I, § 8, cl. 4. State laws which constitute an encroachment on that power cannot stand. *Id.*

Eleventh Amendment. The states clearly waived sovereignty as to the regulation of immigration by adopting the Constitution. While the Eleventh Amendment closed the federal courts to ordinary suits by aliens against states, upon the adoption of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983, the judicial power of the United States was revived as to claims by aliens against states growing out of state action denying equal protection and equal treatment under law with citizens. This conclusion follows from the fact that the states had no sovereign power to regulate the legal status of aliens after 1789, and the jurisdictional bar of the Eleventh Amendment to suits by an alien against a state was lifted by the Fourteenth Amendment in the particular area of its concern.

It would be particularly inappropriate, even ironic, for states to defeat the claim of aliens such as Rabinovitch for back scholarship funds by asserting the ban of the Eleventh Amendment in a case dealing with a subject over which they have lacked sovereign power for 186 years. Such a result would pervert the purpose and intention of the Eleventh Amendment.

B. Congress has enacted a comprehensive plan for the regulation of immigration and naturalization and has specifically legislated as to the legal status of aliens vis-a-vis the laws of the several states. By the provisions of 42 U.S.C. § 1981 Congress has granted to aliens the full and equal benefit of all laws:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

This statute applies to aliens as well as citizens. *Takahashi* v. *Fish & Game Commission, supra,* 334 U.S. at 419 n. 7; *Graham* v. *Richardson, supra,* 403 U.S. at 377; *Guerra* v. *Manchester Terminal Corporation,* 498 F.2d 641, 654 (5th Cir. 1974). Accordingly, this Court has held that "aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens, under non-discriminatory laws.' *Takahashi,* 334 U.S. at 420." *Graham* v. *Richardson, supra,* 403 U.S. at 378.

When Congress enacted Section 1981 pursuant to its plenary power to regulate the status of aliens and in order to specifically protect Fourteenth Amendment rights, *see Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 436 (1968), it necessarily implied a remedy for violations thereof. Plainly compensatory damages is such a remedy. *See* 28 U.S.C. §§ 1343(3) and (4). While the foregoing jurisdictional provisions do not themselves create a damage remedy, they indicate that Congress anticipated such awards would be made under the civil rights acts generally. Further, courts have "the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available." *Brewer* v. *Hoxie School District No. 46,* 238 F.2d 91, 98 (8th Cir. 1956); *Bell* v. *Hood,* 327 U.S. 678, 684 (1945); *see also Texas & N.O.R. Co.* v. *Ry. Clerks,* 281 U.S. 548, 569-570 (1929). In essence, the existence of the statutory right implies the existence of all necessary remedies. *Texas & N.O.R. Co.* v. *Ry. Clerks, supra.*

In *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969), in the context of a suit against a private defendant, the Court specifically considered the question of whether federal courts may award compensatory damages to redress a violation of Section 1982 (the companion provision to Section 1981). The Court held that damages were available in an action under Section 1982 because the "existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id.* at 239.

As such, the Court should not limit any holding in favor of the enforcement of Fourteenth Amendment rights via suits for damages against the states to only those instances in which the statute enforcing Fourteenth Amendment rights specifically and definitely authorizes such an award. There can be no reasonable ground for authorizing such relief via back pay in Title VII cases, but withholding it in § 1981 actions to enforce the rights of aliens (or others).[9]

4. It is suggested in the opinion below, 519 F.2d at 570, and follows from the considerations underlying this Court's opinions in *Ex parte Young, supra*, and *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964), that while suits against a state for money judgments should not be permitted when other adequate remedies exist, if no such other relief will adequately remedy the wrong done and such a choice cannot be avoided, vindication of the rights created by the Reconstruction Amendments must be given priority over the policies underlying the Eleventh Amendment and sovereign immunity. Such a case is very different from commonplace suits asserting essentially state law claims against the state, *Parden* v. *Terminal R.R. of Alabama Docks Dept.*, 377 U.S. 184, 187 n. 3 (1964), or in which the federal question does not involve the vindication of constitutionally protected rights. *See Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279 (1973).

In deciding the instant case, the Court should bear in mind that often there are no adequate alternatives to the private damage claim under the Fourteenth Amendment

[9] Moreover, even in a case seeking to vindicate the right to equal protection of the laws under the Fourteenth Amendment (without reference to any particular statutory enforcement provision), it is submitted that there should be available the damage remedy. *See Bell* v. *Hood, supra; Bivens* v. *Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

and federal enforcement statutes. There is absolutely no way to make petitioners herein whole save by the award of a money judgment. Indeed, absent the deterrent effect that the availability of such relief is likely to have, the states will be absolutely encouraged to ignore Fourteenth Amendment proscriptions until forced to honor them pursuant to prospective injunctions which will exact no penalty for past violations of equal protection. The actual victims of discrimination will, under such a system of law, remain the losers even though they win the litigation.

The right of Alan Rabinovitch to an equal opportunity to receive educational assistance funds (from state revenues to which he and his family regularly contribute by the payment of taxes) can only be vindicated in federal court in a private suit.[10] The only way in which a court can fully vindicate and rectify the wrong done him and alleviate the improper burdens imposed upon him over the years is to grant both injunctive relief and a monetary award. While Rabinovitch has been fortunate enough to be able to attend a free city university, other victims in other circumstances may not be so lucky. Good fortune is no substitute for a clearly defined and fully adequate remedy at law.

Conclusion

For the foregoing reasons and those advanced by petitioners, it is submitted that the Second Circuit's holding that the Eleventh Amendment bars the monetary relief sought by petitioners be reversed. It is further submitted that in deciding the instant case, the Court not foreclose

[10] An action to enforce the federal rights at issue in the *Rabinovitch* case probably does not lie in the New York State courts. *Maloney* v. *New York*, 3 N.Y.2d 356, 361, 165 N.Y.S.2d 465, 144 N.E.2d 364 (1957); *Percy* v. *Brennan*, 384 F. Supp. 800, 809 (S.D.N.Y. 1974).

the independent and distinct claims currently being litigated by Alan Rabinovitch before the United States District Court for the Eastern District of New York.

January 29, 1976.

Respectfully submitted,

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